

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge entered an Award for a 75 percent permanent partial general disability based upon a 71 percent tasks loss and a 100 percent wage loss. The resulting average of 85 percent was reduced by the 10 percent functional impairment to claimant's low back that was found to be preexisting.

Respondent raises an issue concerning its entitlement to a credit for pension benefits pursuant to K.S.A. 44-501(h) and whether claimant is entitled to a 100 percent wage loss when claimant has made no effort to find employment.

Claimant appeals the findings and conclusions by the Administrative Law Judge concerning the nature and extent of his disability, contending he is entitled to an award based upon a permanent total disability. Should a work disability be awarded, however, claimant argues that the average weekly wage should be adjusted to include the value of the fringe benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award entered by the Administrative Law Judge should be modified to award a permanent total disability but should otherwise be affirmed.

The Administrative Law Judge's Award contains a recitation of the record and it is not necessary to repeat those facts herein. The Appeals Board adopts the findings of fact and conclusions of law made by the Administrative Law Judge that are not inconsistent with the findings and conclusions stated in this Order.

Concerning the nature and extent of claimant's disability, the Appeals Board finds claimant is incapable of engaging in substantial and gainful employment. By far the greater weight of the expert medical and vocational testimony in the record supports this conclusion. Only Dr. David J. Clymer goes against the otherwise consensus opinion that claimant is realistically unemployable considering his functional limitations, pain, and his vocational history. Applying the standard of Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993), claimant is essentially unemployable.

Because claimant is entitled to a permanent total disability, the issue concerning the average weekly wage is moot. Claimant is already entitled to the maximum weekly benefit.

K.S.A. 44-501(h) provides for a credit against permanent disability compensation "[i]f the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made" In this case, claimant is

receiving social security disability and not social security retirement benefits. Therefore, no credit is due for those disability benefits.

With respect to the retirement benefits claimant is receiving from his union pension fund, the statute requires that:

[A]ny compensation benefit payments which the employee is eligible to receive under the Workers Compensation Act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement payments or contributions made by the employee

Pursuant to respondent's agreement with the union, benefits were paid by respondent on an hourly basis at the rate of \$1.70 per hour. All contributions were made to the union and the benefits are paid from the union. There has been no showing concerning what portion of claimant's pension comes from contributions made by the employee versus those made by the employer. Claimant was only employed by respondent from approximately June 1994 through the date of accident, but contributions to his pension plan have been made since approximately 1968. The statute requires that the pension be "provided by the employer against which the claim is being made" But what percentage of claimant's weekly pension benefit is attributable to contributions made by the claimant versus what percentage are attributable to contributions made by the respondent or other employers cannot be determined. Therefore, a K.S.A. 44-501(h) credit or offset cannot be computed. See Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, ___ P.2d ___ (1997).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler, dated August 26, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Danny L. Meade, and against the respondent, Electrical Corporation of America, and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred on July 15, 1995, for 21.71 weeks of temporary total disability compensation at the rate of \$326 per week or \$7,077.46, followed by 361.73 weeks at the rate of \$326 per week or \$117,922.54, for a permanent total disability, making a total award of \$125,000.

As of March 4, 1998, there is due and owing claimant 21.71 weeks of temporary total disability compensation at the rate of \$326 per week or \$7,077.46, followed by 115.86 weeks of permanent total compensation at the rate of \$326 per week in the sum of \$37,770.36 for a total of \$44,847.82, which is ordered paid in one lump sum less any

amounts previously paid. The remaining balance of \$80,152.18 is to be paid for 245.87 weeks at the rate of \$326 per week, until fully paid or further order of the Director.

The remaining orders entered by the Administrative Law Judge in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Michael W. Downing, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director